

# Foreword

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Harold Lasswell's classic definition of politics as a process involving "who gets what, when and how"<sup>1</sup> is perhaps the most appropriate description of the current state of the United Nations Conference on the Law of the Sea (UNCLOS). These negotiations have long been characterized—by publicists, diplomats, and even the media—as an essentially juridical exercise, a legal test of the ability of the global community to refashion a major aspect of its international relations. However, the recently concluded Sixth Session of UNCLOS has once again demonstrated that the major dimensions of these critical negotiations remain political. That is, in the classical and traditional sense of international politics, the Conference represents a major systemic conflict among diverse national and international perspectives, values, norms, and expectations. In effect, law of the sea has become caught up in the larger North-South dialogue on reform of the international economic order.<sup>2</sup>

## WHO GETS WHAT

The Sixth Session of UNCLOS was held in New York from 23 May to 15 July 1977. Its product was the controversial Informal Composite Negotiating Text (ICNT),<sup>3</sup> a comprehensive Law of the Sea (LOS) text that is designed to displace the Revised Single Negotiating Text (RSNT)<sup>4</sup> as the substantive base for future negotiations.

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1. H. LASSWELL, *POLITICS: WHO GETS WHAT, WHEN AND HOW* (1958).

2. For a succinct Department of State discussion of the agenda of the North-South dialogue, see DEP'T OF STATE, *THE UNITED STATES AND THE THIRD WORLD* (Discussion Paper 1976) (on file with the *San Diego Law Review*).

3. U.N. Doc. A/Conf. 62/WP. 10 (1977).

4. U.N. Doc. A/Conf. 62/WP. 8/Rev. 1 (1976).

Although the Sixth Session continued progress toward the resolution of issues critical to freedom of navigation, international security, environmental protection, and dispute settlement, it failed, in a major way, to adequately reflect and register the necessary compromise on several issues of vital concern to the general Conference membership. Of these, by far the most important is the issue of deep seabed mining.<sup>5</sup>

According to the Lasswellian formula, disagreement over the seabeds issue necessarily focuses on the question of "who gets what." Not surprisingly, therefore, the element of major controversy within the negotiations centers on the terms and conditions of access to the seabed area. Industrial countries which have developed, or are in the process of developing, the requisite technology for deep seabed mining are seeking a nondiscretionary, nondiscriminatory access system, one which will ensure exploration and exploitation opportunities to States and/or State-sponsored entities under reasonable, clearly specified conditions. Such a system, we argue, will ensure security of tenure for prospective deep seabed miners, enhance incentives for the necessary investments of capital and technology, and, thereby, guarantee that the "common heritage" will be adequately developed for the benefit of mankind.

Developing countries and certain land-based producers would vest primary proprietary and regulatory control over the deep seabed in the International Seabed Authority. Under the terms of the ICNT,<sup>6</sup> the Authority would be empowered on a discretionary basis to establish terms and conditions of access which would:<sup>7</sup>

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5. The problems of the landlocked and geographically disadvantaged States (LL/GDS) are another outstanding example of the session's failure to adequately respond to the perceived interests and needs of an important bloc of States.

The LL/GDS Group comprises 53-plus States within the Conference membership. The issues of primary concern to this group appear to be:

- (a) right of access to and from the sea and freedom of transit;
- (b) LL/GDS rights with respect to fisheries in the economic zones of their respective neighboring States;
- (c) a reasonable system of international revenue-sharing from the exploitation of resources on the continental shelf beyond 200 miles;
- (d) adequate participation and representation in the system of exploitation of the deep-sea area; and
- (e) several general interests which converge with the concerns of the entire Conference membership, for example, dispute settlement, high seas status of the exclusive economic zones, and so forth.

6. U.N. Doc. A/Conf. 62/WP. 10/pt. XI & Annexes II & III (1977).

7. See Darman, *The Law of the Sea: Rethinking U.S. Interests*, FOREIGN AFFAIRS 373, 387-88 (1978) (Richard G. Darman is the former United States Deputy Special Representative for the Law of the Sea Conference).

- (1) impose an arbitrary governmental system of production and price controls, oriented toward protection of the current system of production and producers, without favorable regard to what may be the economic advantages of new systems of production or the dictates of consumer demand;
- (2) mandate technology transfer, treating technological development as if it were a right in itself, not a favorable consequence of economic incentives and property rights;
- (3) charter a new global commercial entity entitled to do business throughout the world, in favored competition with conventional commercial entities, without being subject to any State taxation;
- (4) establish a new international governmental Authority with tax and regulatory reach far beyond the scope of activities and jurisdiction which require its creation;
- (5) be governed by a "supreme" Assembly on the basis of one-State-one-vote "majoritarianism," a system which bears no sensible relationship to one-person-one-vote democracy, or to the real distribution of power, values, or interests; and
- (6) be governed without checks and balances, without adequate procedural protection of minority interests, and without adequate scope for judicial review.

In a press release following the Sixth Session, Ambassador Elliot Richardson, the Special Representative of the President to UNCLOS, termed the seabed provisions of the ICNT "fundamentally unacceptable" to the United States.<sup>8</sup>

#### WHO GETS HOW

Controversy over substantive issues was not the only discouraging aspect of Sixth Session negotiations on seabeds; disagreement also surfaced over questions of Conference procedure.

In respect to the focus of the last session, more time, talent, and attention was devoted to discussions on seabed mining than to any other question; yet, this was the issue on which least progress was eventually made. Even before the Sixth Session convened, a round of multilateral consultations focused on seabed issues. These intersessional negotiations were held in Geneva from February to March, 1977, and produced an atmosphere of positive expectation on some of the most troublesome Committee I issues.

Meanwhile, pursuant to a decision at the end of the Fifth Session, the first three weeks of the Sixth Session were devoted almost exclusively to Committee I discussions on seabed mining issues. Minister

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8. United States Mission to the United Nations, Press Release USUN-57(77), at 6, Jul. 20, 1977 (statement by Ambassador Elliot L. Richardson on file with the *San Diego Law Review*).

Jens Evensen of Norway was appointed chairman of a "Working Group of the Whole," and negotiations initiated in Geneva were resumed.

These first three weeks were a period of hard bargaining, encouraging an active assertion of claims and counterclaims concerning the entire spectrum of seabed issues—production controls, financial arrangements, assembly and council divisions of power and composition, contract procedures, quota and anti-monopoly provisions, and so forth. This plethora of activity indicated that the Conference process was working, and indeed substantial advancement toward a meaningful consensus was emerging. Minister Evensen succeeded in producing a compromise text which, although not totally acceptable to the United States<sup>9</sup> and other Conference participants, did nonetheless reflect the hard-won progress which had been achieved and was considered by most delegations as a basis for further negotiations.

The seabed provisions which finally emerged in the ICNT, however, deviated markedly from the Evensen formulations, and, as noted, the manner of their production and substantive content are unacceptable to the United States. In their present form, the provisions incorporate the views of a small contingent of developing country representatives, none of which represents significant consumer or producer interests in deep seabed mining. This small, closed group unilaterally took it upon itself to upset the emerging balance of interests which the Evensen-led negotiations had sought to achieve.

Not only has this capricious procedural deviation set back negotiations on the design of a seabed mining regime, but it also is contrary to the established precedent of placing before the general Conference membership for its consideration compromise proposals worked out by interested parties in select groups or sub-Conference committees.<sup>10</sup> Therefore, should the unorthodox ICNT provisions on the

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9. See Ambassador Elliot L. Richardson, Statement on Minister Evensen's Draft Text (June 10, 1977) (unpublished paper on file with the *San Diego Law Review*).

10. The revised provisions on the legal status of the exclusive economic zone (EEZ), for example, were the product of negotiations among a sub-Conference group of affected States—the so-called Castaneda Group—which formed to consider the status question informally outside the Committee framework. However, the Castaneda texts were subsequently placed before both the official sub-Conference Committee on the EEZ and before the Conference Plenary for their consideration and scrutiny. This was done before the text was incorporated into the ICNT, in marked contrast to the procedure followed in Committee I. For further discussion of the procedural evolution of the revised EEZ text, see the *United States Delegation Report (UNCLOS)*, Sixth Session of the Third United Nations Conference on the Law of the Sea, Jul. 29, 1977.

seabeds regime be allowed to stand, they will surely provoke a crisis of legitimacy for the negotiations which could further undermine the Conference. Thus, the question of "who gets how" within UNCLOS, a question of a fundamentally apolitical nature in sessions past, has become one of the most salient and politicized issues within the Conference.

#### WHO GETS WHEN

The question of "who gets when" was actually precipitated by the United States during the Fifth Session of UNCLOS. In a gesture of accommodation and compromise, then Secretary of State Kissinger recommended to the Conference a package approach to seabed mining which included the idea of a review of the regime after its first twenty-five years of operation. The purpose of the review was to determine if the provisions of the treaty regarding the system of seabed exploitation were working adequately. When put before the Conference, this proposal elicited a positive reaction among delegations and was praised as a constructive contribution to a vital accommodation on seabed issues.

Discussions on the review proposal were resumed during the Sixth Session, and the idea was incorporated into the ICNT. Article 153 provides that the Assembly convene a review conference twenty years after the entry into force of the Convention. However, the original intent and objective of the review system may be construed as having been distorted. Instead of an event and process providing an opportunity for an objective assessment and evaluation of the system's operation, the review becomes a vehicle for transforming the nature of the regime from an ostensibly parallel access system to a unitary one, giving the Authority exclusive and uncontested jurisdiction over the terms, conditions, and opportunities for deep seabed mining. Thus, Article 153, paragraph 6 of the ICNT asserts, in language uncharacteristically precise and unequivocal, that "[i]f the Conference fails to . . . reach agreement within five years . . . , activities in the Area shall be carried out by the Authority through the Enterprise and through joint ventures . . . , provided however that the Authority shall exercise effective control over such activities." As one analyst of the seabed text of the ICNT has emphasized, this provision could automatically ensure the conversion of the regime of exploitation to a unitary system, provided that a determined group of

States is willing to "stall" the review for a period greater than five years.<sup>11</sup>

Therefore, even if those advocating total control by the Authority over the seabed area are unable to achieve their objectives in the short-term, Article 153, if retained, ensures and guarantees the success of their preferred alternative within the immediate future. Given the several years of lead-time required before deep seabed mining operations can actually be undertaken on a commercial scale, the ICNT review provision alone, perforce, politicizes the issue of "who gets when." Necessarily, it will be an issue of intense debate at the upcoming Seventh Session of the Conference and is certainly one of the major issues on which success or failure of the Conference depends.

#### WHITHER LAW OF THE SEA?

This symposium in the *San Diego Law Review*, as the preceding descriptive analysis demonstrates, appears at a most critical period in the history of the Law of the Sea Conference. In the context of "who gets what, when and how," the Sixth Session has exemplified, once again, the volatile political context of the negotiations.

In many respects, the Sixth Session also highlights several critical dimensions in the gradual transformation of our international society: the saliency and highly politicized nature of economics in relations among nations; the growing capacity of developing countries to identify and coalesce around mutually perceived core interests; and the highly confrontational nature of the dialogue between developed and developing States.

Furthermore, the results of the session challenge some of our more traditional and fundamental premises about the nature and characteristics of the international system. Heretofore, issues pertaining to national security and sovereignty have held premier place in the hierarchy of State interests. Significantly, however, general accommodation was achieved on questions pertaining to the high seas status of the economic zone, passage through straits, and the essential elements of a system of dispute settlement, all critical issues which impinge most directly on the nature of national sovereignty.

The necessary ability and will to negotiate these issues, and a marked absence of a similar capacity concerning seabed issues, must be viewed in the overall context of attempts at systematic transformation of the international order.

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11. See Darman, Problems with Part XI of the Informal Composite Negotiating Text (unpublished paper on file with the *San Diego Law Review*).

One can imagine that had this fundamental trade-off between navigational and security interests and the design of a deep seabed mining regime been the price of a comprehensive treaty in earlier sessions of the Conference, a possible accommodation could have been reached. However, there is a deepening and more sophisticated perception among both developed and developing countries that the issue of seabeds represents interests more fundamental than the immediate economic benefits envisioned. Thus, as the negotiations have progressed, the stakes in the process of "who gets what, when and how" have been considerably enlarged and elevated. The issues are no longer confined to pragmatic questions of State practice and jurisdiction but encompass more issues of States' principles; the mandate is no longer the technical design of a regime for deep seabed mining but the architectonic construction of the contours of a future international legal, economic, and political order; the struggle is no longer for the codification of international law but a competition for the control of future global institutions. In this context, national interests are increasingly defined in terms of ideological categories: centralization versus decentralization; private enterprise versus Authority control; resource policies versus free market principles; unitarianism versus pluralism; and equity versus efficiency. This trend explains not only the increasing politicization of the negotiations but also the critical nature of the current stalemate.

As our post-war international experiences have taught, the greater the ideological aura surrounding political issues, the more national postures toward these issues become dichotomized.

The United States, for its part, can neither afford nor does it desire a "cold war" with developing countries, irrespective of the issues involved. We continue to believe that a Law of the Sea Treaty is not only desirable but essential to the management of interdependence in ocean space. The conclusion of such a treaty could indeed usher in a new era in ocean relations, one which could have a profoundly positive influence on the current state of international affairs, especially between developed and developing countries. To this end, we are actively participating in a series of intersessional meetings which will be an important test of the readiness of the conferees to lay both the procedural and substantive groundwork for the successful conclusion of negotiations at the Seventh Session of UNCLOS (scheduled to be held in Geneva from 28 March to 19 May 1978).

If others are prepared to do so, we will approach the Seventh Session, as we have all others, with a sense of fairness and compromise, but also with a clear recognition that failure to reach a comprehensive LOS agreement could effectively doom the Conference. We ask of our counterparts, and especially the developing countries, that they too approach the upcoming session with a seriousness and resolve to reach a final agreement. For developing countries, the Conference represents a first opportunity for universal participation in the development of a new politico-economic and legal regime for a significant aspect of contemporary and future international relations. It is a bold and challenging initiative; the opportunity must not be missed.